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(9)

No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* OF BOYD-BUCHANAN SCHOOL, SILVERDALE BAPTIST ACADEMY, CHATTANOOGA CHRISTIAN SCHOOL, and GRACE BAPTIST ACADEMY OF CHATTANOOGA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Affirmation of the Sixth Circuit Court of Appeals decision will result in the division, if not dissolution of the TSSAA athletic structure into separate public and private school entities 5

A. TSSAA membership provides a vital link between public and private school children. . 7

B. Separation of public and private schools in interscholastic competition will expose the Small Independents and their students, coaches, and other faculty members to substantial financial and academic burdens. . 8

II. Affirmation of the Sixth Circuit Court of Appeals decision will result in unregulated recruiting of middle school children for athletics and other extracurricular activities. 10

A. Unlimited recruiting will lead to the exploitation of children and to the subordination of academic development to athletics. 12

B. Unregulated recruiting will adversely affect the educational environment for students at the Small Independents. 13

C. Unlimited recruiting will result in the loss of competitive equity between the TSSAA member schools. 14

III. The Tennessee Secondary School Athletic Association is a voluntary association of public and private schools. 16

CONCLUSION 17

TABLE OF AUTHORITIES

Federal Cases

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (Thomas, J., dissenting) 18

South Macomb Disposal Auth. v. Township of Washington, 790 F.2d 500, 505 (6th Cir. 1986) 6

Triplett v. Tiemann, 302 F. Supp. 1239 (D. Neb. 1969) 6

Other Authorities

Brief of Amicus Curiae National Federation of State High School Associations in Support of the Petition for a Writ of Certiorari at 8-10, *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, (No. 06-427) 12

STATEMENT OF INTEREST[1]

The *Amici Curiae* are all small independent private schools located in southeastern Tennessee (hereinafter "Small Independents") and are currently voluntary members of the Tennessee Secondary School Athletic Association (hereinafter "TSSAA"). The Small Independents are comprised of private schools with enrollments of fewer than 500 students. Collectively, more than 1,237 students attend their secondary grade levels.[2] The Small Independents do not provide financial aid to athletes at the varsity level and they compete with public schools in TSSAA's Division I.[3] Brentwood Academy (hereinafter "Brentwood") competes in Division II, which allows need-based financial aid for varsity level athletics.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, the *Amici Curiae* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *Amici Curiae* and their respective counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.3, letters evidencing this consent by TSSAA have been filed with the Clerk. Consent letter from Brentwood Academy is attached hereto as Exhibit A.

[2] Boyd-Buchanan School has 347 students; Chattanooga Christian School has 405 students; Grace Baptist Academy of Chattanooga has 181 students; and Silverdale Baptist Academy has 165 students.

[3] The TSSAA by-laws provide for two divisions into which schools are placed for tournament competition: Division I are schools whose student athletes compete at the varsity level and do not receive need-based financial aid. Division II are those schools whose student athletes compete at the varsity level but may be the recipients of need-based financial aid.

The Small Independents and similar institutions, not only throughout Tennessee but the country, have a vital and unique interest in the outcome of this case and are compelled to file this *Amici Curiae* brief to assist the Court in assessing both the policy and prosaic ramifications of the case on entities other than the parties. The interests of the Small Independents are not represented by either the TSSAA or Brentwood, the original plaintiff in the underlying case. Brentwood is not the voice of all private school members of the TSSAA in this matter. This is not a simple public versus private school dispute and the Small Independents represent a third constituency in this instance whose needs and opinions run contrary to the voice of the more affluent private schools such as Brentwood.

An affirmation by this Court of the underlying Sixth Circuit holding will impede the ability of the Small Independents to provide extracurricular athletics as part of an effective and holistic education. It will impede that ability not only in athletics but in all extracurricular activities, including, e.g. forensics, music, and debate. The Small Independents have remained vigilant in maintaining the appropriate balance between academics and athletics for their students. To further that desire, they *voluntarily* joined the TSSAA because that association provides a structure for interscholastic athletics that is properly aligned with the goal of maintaining such a healthy balance for students. TSSAA's voluntarily-promulgated rules and regulations, particularly those against unregulated or unlimited recruiting of the child athlete, provide the framework in which the Small Independents can holistically educate their students, offer them a viable athletic program, and at the same time maintain the integrity of their academic communities.

If allowed to stand, the Sixth Circuit's decision will have an adverse impact on the ability of the Small Independents to continue to provide this environment which nurtures and teaches the whole child - - the athlete and the academic - - because the TSSAA will be forced to exclude all private schools from its membership. Small Independents will then not only face increased costs, but also the possible elimination of sports and other programs due to these costs. Perhaps most importantly, they will lose the ability to provide invaluable interaction between diverse public and private school students. The Small Independents respectfully submit this brief to the Court to present and protect their substantial interests in seeing that TSSAA membership (as well as membership in similar interscholastic organizations throughout the United States) remains open to private schools - - such as the Small Independents - - and their students.

SUMMARY OF ARGUMENT

Athletic competition through the TSSAA is critical to the total educational needs of students at the Small Independents. Should this Court affirm the current decision of the Sixth Circuit, recruiting of students for athletics, forensics, vocal competitions, band, fine arts, and other vital extracurricular educational activities will begin as early as the fifth grade. Such recruiting will result in an undue influence that dramatically affects not only the educational interests of preadolescent children but also those of their families, athletic peers and fellow classmates.

The TSSAA is a voluntary association of public and private schools with the members promulgating regulations and rules. A school which voluntarily agrees to abide by the rules of an interscholastic association must not then be allowed to sue that association for alleged violations of First

Amendment speech, in particular non-protected recruiting speech for athletic gain. If this Court allows that scenario to stand by upholding the Sixth Circuit's decision, the educational goals of the Small Independents, and those of similar institutions throughout the land, will become unattainable.

Affirmation of the Sixth Circuit decision will result in a scenario where the dual participation of public schools and the Small Independents in TSSAA Division I competitions will cease. The interaction between students from multiple and various socioeconomic backgrounds which is created by Division I competitions will likewise cease or at best, seriously diminish. Student athletes will no longer be able to observe and interact with children from other communities, neighborhoods and backgrounds on the athletic field, and the ability to develop respect and interaction among students and families from diverse areas will be severely curtailed. Separation of public and private divisions of the TSSAA will expose children, coaches, faculty, and families of the Small Independents to increased travel and expense as public schools will exclude the Small Independents from their athletic schedules. Increased travel commitments will result in inordinate amounts of time for students, coaches and faculty away from their regular classroom learning environments. Such a scenario will affect not only the student and faculty attending the event, but the non-athlete remaining in the classroom as well.

Open recruiting will place undue influence on children at tender ages. The decision to allow students with exceptional talents in forensics, vocal events, band, the thespian arts, and athletics to be recruited in their formative tender years is anathema to the balance that the Small Independents seek for their students. Schools with a large athletic budget will have

an unfair advantage in the recruitment of students, and competitive equity will suffer as the TSSAA has historically classified schools according to enrollment levels; a procedure not uncommon in interscholastic extracurricular associations throughout the country.

The above-delineated negative effects on children and student athletes will go far beyond the playing field into all areas of school life where there is healthy competition between schools and students. All interscholastic extracurricular activities will face a future without the organizations which allow them to compete with other schools and particularly with public schools. All students of the Small Independents, whether athletes or not, will be barred from or severely limited in acquiring a healthy, wide-ranging education with varied and diverse interaction with their peers throughout Tennessee, and in the final analysis, this effect on interscholastic activities will flow throughout the country.

ARGUMENT

I. Affirmation of the Sixth Circuit Court of Appeals decision will result in the division, if not dissolution of the TSSAA athletic structure into separate public and private school entities.

The TSSAA provides a framework under which public and private schools may compete against one another under the same agreed-upon rules. The TSSAA's viability as an interscholastic association for both public and private schools is heavily dependent on its ability to effectively maintain an equitable "playing field" between its public and private school members. The Sixth Circuit's decision substantially threatens the equitable coexistence between TSSAA's public and private school members because it effectively opens the door for the

private schools to challenge through litigation the TSSAA's rules whenever one of them disagrees with the manner in which the rules are enforced. Public schools, which do not have legal standing to file constitutional claims in the same manner as the private schools, will be left standing alone in the TSSAA.[4]

The disparate balance between the public and private schools that would result from the Sixth Circuit's decision will place too great a strain on the TSSAA's ability to include private schools as members. The TSSAA could not afford to subject itself to constant and protracted litigation initiated by disgruntled private school members over enforcement of its rules. The public schools, which comprise over 80% of the TSSAA's total membership, will be forced to either completely dissolve the TSSAA as it now exists or to exclude private schools from TSSAA membership. Under either scenario, a complete separation between private and public schools in interscholastic competition will likely result.

If a split occurs between public and private schools in interscholastic competition, the Small Independents stand to lose more than either the public schools or the more affluent private schools such as Brentwood. Unlike the more affluent private schools in TSSAA's Division II, the Small

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[4] See *Triplett v. Tiemann*, 302 F. Supp. 1239, 1242 (D. Neb. 1969) (holding that public school districts are not legally subject to injury under the Fourteenth Amendment because it has no application to actions by a state against its political subdivision) and *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986) (a political subdivision of a state cannot challenge the constitutionality of another political subdivision's ordinance on due process and equal protection grounds).

Independents compete in the same division as public schools.[5] Consequently, the majority of the schools that comprise the sports schedules for the Small Independents' athletic teams are local area public schools, and many relationships and rivalries have been forged between the Small Independents and these public schools over the years. If a public-private split occurs, the Small Independents will lose the invaluable tangible and intangible benefits derived from competition with local public schools.

A. TSSAA membership provides a vital link between public and private school children.

Small Independents maintain an essential connection to local area public schools that they would not have without TSSAA membership. In most cases, the athletic field is the only field of interaction between students of the Small Independents and public schools. The Small Independents have no desire to educate their students in a vacuum where they are virtually isolated from the majority of students in their community. An integral part of any child's education is learning how to interact and communicate with individuals from different backgrounds. If the link that TSSAA membership provides between public and private schools is severed, children from both public and private schools will lose opportunities for developing respect and appreciation for talents, lifestyles and challenges that have developed in arenas different from their own.

On a more general level, a public-private split will only enhance the isolation of some communities along with the attendant negative consequences such isolation entails.

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[5] See footnote 1.

Animosity and mistrust invariably result from the segregation of communities, especially along socioeconomic lines. The mission common to all schools, both public and private, of educating children to be well-serving members of their community will be encumbered if students are exposed only to children from similar backgrounds. Maintaining a forum such as the TSSAA for the interaction of children from multiple and various backgrounds is important for building strong communities and should be preserved at all costs.

B. Separation of public and private schools in interscholastic competition will expose the Small Independents and their students, coaches, and other faculty members to substantial financial and academic burdens.

In addition to the harmful effect of losing social interaction with public schools, the Small Independents will also suffer significant tangible consequences that will result from a split between public and private interscholastic associations. In the event the TSSAA either dissolves as it now exists, or excludes private schools from membership, the Small Independents will be confronted with two options: (1) remain independent and schedule competition with other schools as they can on a limited basis, or (2) join with a "private-only" athletics association. The Small Independents are all located in the southeastern region of Tennessee, an area where there are too few private schools of similar nature in the local communities to fill the Small Independents' sports schedules. If the Small Independents are not able to compete against local public schools, they will be forced to schedule private schools from other regions of the state in order to fill their schedules.

Athletic schedules with a substantial number of "out-of-town" teams will place a significant financial burden on the Small Independents to maintain viable athletic programs. For some Small Independents, the estimated increase in mileage for its athletic teams will be fourfold. Factoring in transportation, lodging and meals for their teams on the road, it costs the average Small Independent approximately $10.00 per mile. For perspective, in order for a Small Independent in Chattanooga to play football with another private school in Knoxville, the nearest region where other private schools can be found to play, the team must travel 224 miles round-trip for approximately four hours. The cost of making a trip to Knoxville for a Small Independent football team is approximately $2,240.00. A trip to Nashville is a 270 mile round-trip and takes more than four hours. The cost of making a trip to Nashville for a Small Independent football team is roughly $2,700.00.

These figures include the cost of travel for the team and coaches, but there is the added expense that is incurred by the families of the student athletes and coaches in traveling to support the teams. The figures reflect how costly just *one* trip would be to either Knoxville or Nashville for a Small Independent football team in Chattanooga. If a Small Independent in Chattanooga can no longer participate in the TSSAA, it will be forced to schedule multiple out of town games every season with teams from either Knoxville, Nashville, or even Memphis which is a 690 mile round trip to western Tennessee. Under this travel scenario, the financial burden of the Small Independents to maintain athletic teams will be considerable and perhaps prohibitive.[6]

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[6] These schools offer a variety of sports for both boys and girls including cross county, basketball, baseball, softball, volleyball,

In addition to the increased travel expense that will result from competing with schools from distant locales, a substantial academic burden will be incurred as well. The absence of student-athletes and coaches will be more frequent and for longer periods of time. In one of the Small Independents, more than 70% of the student body is involved in extra-curricular activities. This means that 7 out of 10 of its students will be absent from school much more frequently and at times for multiple days. Increased absence of coaches adversely affects the students who do not participate in athletics as well, because these coaches are generally teachers at the Small Independents. In addition, the non-coaching teachers' responsibilities to "catch-up" the absent student-athletes will increase. Consequently, the quality of instruction and material covered in the classroom will decrease. The increased academic burdens on all of the students will make it harder for the Small Independents to justify maintaining athletic programs if they come at the expense of their academic missions. Membership in the TSSAA, and thus the ability to compete against local area public schools, is the most viable way for the Small Independents to offer athletic opportunities to their students without sacrificing the academic welfare of all their students, teachers, and families.

II. Affirmation of the Sixth Circuit Court of Appeals decision will result in unregulated recruiting of middle school children for athletics and other extracurricular activities.

The Small Independents recognize the unique benefits of athletics and other extracurricular activities. Competition in

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soccer, tennis, among others. Travel costs alone would jeopardize the continued viability of these sports.

athletics is often the most effective way to teach lessons such as teamwork, organization and management of pressure. However, the Small Independents are also concerned with maintaining the appropriate balance between athletics and academics and utilizing athletics as an educational tool. To this end, the Small Independents joined the TSSAA which provides a structure for interscholastic athletics that is properly aligned with their goals and objectives in providing healthy athletic opportunities for their students.[7]

The TSSAA and similar organizations are voluntary organizations and their rules, such as those against unlimited recruiting of student athletes, are voluntarily promulgated and adhered to by members because the members agree that unlimited and unregulated recruiting of student athletes is harmful to students and thus not acceptable. If these rules are allowed to be challenged and subverted at will by voluntary member schools, such recruiting will become the de facto state of affairs in secondary school athletics. It will completely undermine the purposes and objectives of the Small Independents for joining the TSSAA, as it will inevitably lead to the subordination of academics to athletics, competitive inequities, and the disruption of social harmony in the schools. If agreed-upon constraints against recruiting for athletic purposes are not upheld, then all TSSAA member schools fail to protect their students from entering the culture of athletic obsession at too young an age. The danger also exists that unlimited recruiting will spread from the athletic realm and eventually infect other extracurricular activities in

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[7] The TSSAA offers its members a dependable program for joint and mutual athletic competition as well as educational programs for coaches, catastrophic insurance for the student athletes, and the opportunity to compete in championship games which it sponsors.

which schools compete such as forensic, vocal, band, and artistic competitions.

A. Unlimited recruiting will lead to the exploitation of children and to the subordination of academic development to athletics.

If a child is recruited to play basketball or soccer when he is in the fifth grade, no positive impact can result for the child or the school. We need look no further than the real life examples regarding the harmful effects of recruiting that are prevalent in major college athletics today.[8] The harmful effects experienced by high school graduates being recruited by colleges will be amplified for the middle and grade school child who is going through the most important formative years of his or her life. Exploiting a child at such a young age sends the wrong message: that the value of an individual should be measured by the amount of his or her athletic ability.

From an academic standpoint, recruited child athletes have pressure to perform on the field and to live up to the expectations placed upon them. It is only natural that immense pressure to perform athletically will significantly dictate what priority a student places on athletics in relation to academics. When a student is recruited aggressively as a fifth grader, the temptation to place athletics over academics will be well-nigh impossible to resist for that child.

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[8] See Brief of *Amicus Curiae* National Federation of State High School Associations in Support of the Petition for a Writ of Certiorari at 8-10, *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, (No. 06-427), for concise and informative explanation of harms caused by unlimited recruiting in intercollegiate athletics.

B. Unregulated recruiting will adversely affect the educational environment for students at the Small Independents.

Perhaps the most damaging result of unregulated recruiting is the negative impact it will have on the social climate of a school. In the smaller and more intimate environments which exist at the Small Independents, a positive environment where the class sizes are very small and the students all know each other relatively well is the norm. Recruiting under this scenario will have an adverse impact on the relationships between recruited athletes and other non-athletic students. Such social disruption will injure the constructive social environments found at the Small Independents. Recruited child athletes can develop a false sense of superiority over others from the extra attention they receive at early ages. This distorted sense of superiority will stress their relationships with their parents, siblings, peers, and teachers. Non-athletic students may experience feelings of resentment and inadequacy if their achievements are not adequately recognized. Moreover, the opportunity to participate in athletics will be closed to those less talented than the recruited athletes but who wish to participate in school athletics, subverting the very purpose of offering athletics as an educational experience.

Unregulated recruiting and the resulting increased pressure to win will also have a negative impact on the ability of teachers and coaches to properly perform their duties. Teachers may feel subtle pressure to maintain the eligibility of a star athlete and grade him or her less stringently. Coaches will also feel compelled to subordinate their obligations as teachers to their coaching duties.

The negative effects of such recruiting have the potential to injure the social climates of all schools, not just the Small Independents. If allowed to pervade the realm of interscholastic athletics, the educational missions of all schools will be undermined and subverted from their stated objectives and goals. The responsibility to prevent unlimited recruiting lies with all who have an interest in maintaining healthy academic and social environments in which children are educated.

C. Unlimited recruiting will result in the loss of competitive equity between the TSSAA member schools.

Competitive equity is essential in allowing the Small Independents to promote fairness, sportsmanship and respect for others among their students. Without competitive equity, students will be less willing to participate in athletics or other competitions. Community support will decrease, and the very objectives for providing athletic opportunities for students will be frustrated. The invaluable benefits that athletic competition provides for children can only be realized if the competition remains fair and equitable between its participants.

A primary objective of any TSSAA-type association organized for competition is this maintenance of competitive equity between participants. Specifically, the nature of TSSAA's structure is geared towards maintaining the competitive equity between the TSSAA 's public and private school members.[9] The TSSAA also promulgated its limited

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[9] See footnote 1. The TSSAA's divisional classifications are determined according to the enrollment number of member schools

recruiting rules in part to compensate for the disadvantages that public schools naturally have relative to private schools. Unlike the private schools, public schools are restricted to their school districts to obtain students and student athletes. Also, affluent private schools often have better athletic facilities than the public schools because they benefit from alumni and other raised funds. Without the TSSAA's rules that limit recruiting, private schools would be able to unfairly recruit student athletes or other interscholastic "stars" away from the public schools with little restraint.

Public schools are not the only beneficiaries of the rules limiting recruiting. Unregulated recruiting will adversely affect the competitive equity between the Small Independents and the more affluent private schools which have substantially larger budgets for their athletic programs. The more affluent schools have the ability to offer more financial aid and better athletic facilities to entice student athletes to enroll at their schools. The Small Independents simply do not have the money, desire, or goal to recruit children in the same manner as some of the more affluent private schools. The protections that the TSSAA rules afford the Small Independents against unregulated recruiting may well disappear in a "private-only" association. The inequities between the Small Independents and the more affluent private schools with whom they would

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in order to ensure that small schools are not unfairly placed in a division with large schools. For example, within Division I football classifications, both public and private schools compete in one of five sub-divisions (1A-5A), with 5A being the division for the largest schools and 1A being the division for the smallest schools. TSSAA has also imposed a 1.8 "multiplier" to private schools in Division I which, in effect, differentiates private and public schools of similar enrollments. This number is then applied to determine under which classification the private school falls.

be forced to compete at that point for athletes would only be exacerbated. Some competition to obtain good students and excellent athletes is realistic and perhaps even desirable. However, a free-for-all environment of unlimited recruiting creates an insurmountable gap between the more affluent private schools and everyone else in athletics and other interscholastic competitions.

III. The Tennessee Secondary School Athletic Association is a voluntary association of public and private schools.

A crucial factor to this Court's ultimate decision is that the TSSAA is a *voluntary* association made up of public and private schools. Each school has the opportunity to join the TSSAA, and if it so chooses, to withdraw from the association. The members contractually agree to follow by-laws as well as rules and regulations promulgated by the membership. Each member of the TSSAA has an opportunity to participate by vote and representation through the TSSAA Legislative Counsel and Board of Control on rulemaking decisions. The rule limiting athletic recruiting of student athletes is one promulgated by the very association of which Brentwood and all other school members of the TSSAA are members. Stated differently, Brentwood and the other TSSAA member schools, including the Small Independents, have voluntarily placed themselves under the aegis of the limited recruiting rules.

Essentially each member school has entered into a voluntary contract with the TSSAA in order to implement rules and regulations for interscholastic athletic competitions. The by-laws provide for (1) notification by the TSSAA to the member of any alleged violation of the rules, (2) hearings on same, and (3) an appeals process. Again, these by-laws were

promulgated by the member schools which include Brentwood. The regulations of the TSSAA, as well as their enforcement, teaches students the lessons of respect for structure and authority, discipline to follow the rules, and honor in accepting the penalties for violating them. Students learn that life may not always appear fair, and that sometimes their actions will be criticized but that they can accept the results graciously and according to the rules.

All students and their families reasonably believe that if their school is a member of the TSSAA, they can be assured that school athletic events will occur on as fair and balanced a playing field as is possible. These students and families believe that the less talented athlete will have the opportunity to play under the TSSAA, and that the school's competition will be varied and intense; sometimes they will lose and sometimes they will win, but they will always have a fair opportunity to win or lose.

The underlying decisions should not stand; allowing a school which voluntarily agrees to abide by the TSSAA's rules and regulations to sue the association for alleged violations of its free speech rights under the First Amendment will render the raison d'etre of interscholastic extracurricular associations moot. Such a result is particularly egregious when the speech is non-protected recruiting for athletic gain.

CONCLUSION

The TSSAA is a voluntary organization comprised of public and private schools that fosters a dependable program for joint and mutual athletic competition. The very purpose of athletic competition is to promote fairness, respect, discipline, and honor. Should this Court allow the Sixth Circuit decision to stand, high school athletic competition will

be permanently altered and harmed to the detriment of the ultimate beneficiary, the high school student. Unlimited recruiting of children athletes is contrary to the goals of secondary school institutions, and certainly contrary to the goals of the *Amici* now before this Court.

The impact of the prior decisions go far beyond athletic competition. As Justice Thomas stated in the dissent of this Court in *Brentwood I*, many other organizations that ". . . foster activities, enforce rules, and sponsor extracurricular competition among high schools – not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading" will be affected. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 314 (2001) (Thomas, J., dissenting).

For the reasons set forth, the *Amici* request that the judgment below be reversed.

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